STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-208

May 18, 1998

CTC COMMUNICATIONS, CORP., V. NET D/B/A BELL ATLANTIC
Request for Commission Investigation into Unlawful and Unjust Practices and for an Award of Civil Damages and Civil and Criminal Penalties Against Bell Atlantic Maine

ORDER ADDRESSING JURISDICTIONAL ISSUES

WELCH, Chairman; NUGENT and HUNT, Commissioners

I. INTRODUCTION AND SUMMARY

CTC Communications Corp., (CTC), a telephone utility having authority to provide service in Maine pursuant to 35-A M.R.S.A. § 2102, has filed a complaint under 35-A M.R.S.A. § 1302(3) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Maine, a telephone utility with long-standing authority to provide service in Maine pursuant to private and special law.[1] CTC alleges that enforcement by Bell Atlantic of "termination clauses" that apply to certain services both under its rate schedules and associated terms and conditions, and under some special contracts between Bell Atlantic and its customers,[2] constitute (1) a violation of provisions of the Telecommunications Act of 1996 (TelAct) that prohibit unreasonable restrictions on resale by incumbent local exchange carriers; (2) an "unreasonable act or practice" by a public utility within the meaning of 35-A M.R.S.A. § 1306(2); and (3) the breach of the "standard Interim Resale Agreement" between CTC and Bell Atlantic. CTC alleges that all three claims are cognizable by the Commission.

The complaint presents issues concerning the Commission's jurisdiction. First, has CTC properly brought the complaint pursuant to 35 M.R.S.A. § 1302(3), or must we consider the complaint to be only a request for a Commission investigation

[1] P&SL 1885, c. 513.

[2] A "termination clause" imposes charges on a customer when the customer terminates a service prior to a minimum service period. Minimum service periods and termination charges typically apply to customers in exchange for rate discounts from the regular rate that is available for the same service when the customer is not willing to commit to a minimum service period.

pursuant to section 1303? Under section 1302 the Commission's jurisdiction is mandatory, i.e., it must consider a complaint unless it "is satisfied that the utility has taken adequate steps to remove the cause of the complaint or that the complaint is without merit . . . ." By contrast, under section 1303, the Commission has discretion whether to commence an investigation.

Second, may, or must, the Commission consider a claim that certain practices by a utility violate federal law, even though the federal statute in question (47 U.S.C. § 251) does not specifically state that state commissions have jurisdiction?

We find that it is not necessary to reach the question of whether the Commission has jurisdiction under section 1302(3) over a complaint filed by one utility against another because we will commence an investigation on our own motion pursuant to section 1303. We also decide that we must consider the claim brought pursuant to the TelAct, 47 U.S.C. § 251. Finally, in Part IV, we address the scope of this investigation.

II. JURISDICTION UNDER SECTION 1302(2)

CTC filed the complaint in this case under 35-A M.R.S.A. § 1302(3). Section 1302(3) states:

> The commission may institute or any public utility may make complaint as to any matter affecting its own product, service or charges. The complaint shall be processed in accordance with subsection 2.

Whether the complaint is brought under subsection 1 of section 1302 (by 10 persons) or under subsection 3 (by a utility or the Commission), the Commission must conduct an investigation of the matters raised in the complaint unless it determines that "the utility has taken adequate steps to remove the cause of complaint or that the complaint is about merit . . . ." 35-A M.R.S.A. § 1302(2).

CTC argues that one public utility may complain against another under section 1302(3). Under that interpretation a single public utility has the same ability to bring complaint as do 10 persons under section 1302(1).

Bell Atlantic argues that section 1302(3) "empowers a utility to bring a complaint *against itself*, not against another utility, without the need for ten aggrieved persons." Bell Atlantic cites *Edmund J. Quirion, Request to Abandon Service*, MPUC Docket No. 96-030, Order (March 22, 1996). Bell Atlantic's

reliance on *Quirion* is misplaced. The *Quirion* decision held that Mr. Quirion (who was a public utility) could not file a complaint under section 1302(3) because the matter he complained about, his request to abandon service, was not one that affected the utility's *present* "product, service or charges," but was instead a "matter that will affect . . . service only if the request is granted." In *Quirion*, we relied on *Central Maine Power Co. v. Public Utilities Commission*, 405 A.2d 153 (Me. 1979), which held that a complaint (by ten persons) under section 1302(1) must complain against present, not proposed, rates.[3]

Quirion did state that section 1302(3) "does allow a utility to bring a complaint against itself." It did not, however, state that a utility could not bring a complaint under that subsection against another utility.

We draw no implication from the *Quirion* decision that one utility may not complain about another utility under section 1302(3). *Quirion* specifically did not address the issue, and any such statement or implication would have been unnecessary to the decision in the case.[4]

Nevertheless, we find that it is not necessary to decide in this case whether one utility may use section 1302(3) to bring a complaint against another utility to allege that the second utility's actions are affecting its "own product, service or charges." Under 35-A M.R.S.A. § 1303 we have discretion to commence an investigation, upon the request of any person, if we believe there is merit to the request. For the reasons described in Part IV, we find that there is sufficient merit to CTC's

[3]We are aware of one other case in which one utility invoked this section to bring complaint against another utility. *China Telephone Company v. New England Telephone and Telegraph Company*, Docket No. 88-113. In that case, however, neither the parties nor the Commission raised any issue about whether section 1302(3) could be used by one utility to complain about another utility's actions. Ultimately, the Commission ruled that it had jurisdiction of the proceeding under 35-A M.R.S.A. § 7901, and did not address any issue concerning section 1302(3).

[4]The decision that we did not have jurisdiction for the reasons actually stated (that section 1302 could not be used to complain about a matter that affected future service) was necessary, because jurisdiction under section 1302 would have imposed a nine-month deadline on the case that does not apply under section 1104.

request, and that it presents sufficiently important policy issues, that we will commence an investigation.

III. THE FEDERAL CLAIM

CTC claims that Bell Atlantic's actions violate the provisions of 47 U.S.C. § 251(b)(1) and (c)(4)(B). Those provisions were enacted as part of the Telecommunications Act of 1996. The former provision applies to all local exchange carriers (LECs), and states that they have the duty "not to prohibit, and not to impose unreasonable or discriminatory restrictions or limitations on, the resale of telecommunications services." The latter provision applies to incumbent local exchange carriers (ILECs), including Bell Atlantic. It states both a positive obligation, as well as a prohibition similar to that contained in section 251(b)(1), applicable to all LECs. Thus, ILECs have the "duty":

> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service. . . .

47 U.S.C. § 251(c)(4).

On April 21, 1998, the presiding officer in this case requested the parties to provide legal memoranda on the question of whether the Commission may, or must, consider a claim that certain activities violate federal law, even though the federal law in question does not expressly confer jurisdiction on state utility commissions (or any other state agencies, including courts) to enforce the federal obligation.[5]

In a number of places, the TelAct specifically confers jurisdiction (including exclusive jurisdiction) on state public utility commissions. *See,* e.g., 47 U.S.C. § 252(b)(arbitration

[5]47 U.S.C. § 251(c)(4)(B) does continue, however:

> . . ., except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers.

of disputes between ILECs and other carriers); § 252(d)(2)(determination of just and reasonable rates for interconnection and unbundling); § 252(d)(3) (determination of wholesale rates for resale); § 252(e) (approval or rejection interconnection agreements); § 252(f) (determination of whether statements of general terms and conditions submitted by Bell operating companies comply with the Act's requirements regarding increasing competition).

The U.S. Supreme Court has addressed the question of whether state courts must consider claims brought pursuant to federal law on a number of occasions. In *Howlett v. Rowe*, 496 U.S. 356 (1990), the U.S. Supreme Court held that a state court must consider a claim brought pursuant to federal law (in that case 42 U.S.C. § 1983).[6] The Court's analysis was based on the supremacy clause of the U.S. Constitution and that the law of the United States is also the law of each of the states:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum - although both might well be true - but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

496 U.S. at 367.

The Court held that a "state court may not deny a federal right when the parties and controversy are properly before it," absent a "valid excuse."[7] In *Howlett*, the state court had jurisdiction over state law claims arising from the same factual circumstances. *See* also *McKnett v. St. Louis & San Francisco R. Co.,* 292 U.S. 230, 233-34 (1934).

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[6]42 U.S.C. § 1983 prohibits persons acting under color of state law from depriving other persons of federal rights.

[7]A "neutral state rule regarding the administration of the courts" or the lack of competence by a court "to hear the case in which the federal claim is presented" may serve as "valid excuses."

The fact that a federal statute may specifically confer jurisdiction over some matters to a state court or agency does not imply that the states lack jurisdiction over other requirements imposed by a federal act. The rule set forth in *Howlett* and in previous Supreme Court cases appears to be that state courts have jurisdiction over any federal claim unless jurisdiction in federal courts or agencies is exclusive either by express enactment or by implication. *See* discussion in *Claflin v. Houseman*, 93 U.S. 130, 136-139 (1876). Section 1983 (the federal claim in *Howlett*), for example, is silent on the question of jurisdiction. Federal Court jurisdiction is exclusive, for example, in admiralty matters and over federal crimes. *Id.* at 139-140.

The question before us is whether a state utility commission has an obligation, similar to that of state courts, to enforce certain federal claims. In *Howlett* and in prior cases, the Supreme Court placed emphasis on the fact that the suits had been brought in state courts of general jurisdiction. The Maine Public Utilities Commission is not a court of general jurisdiction. Its powers and its jurisdiction are limited by statute to matters relating to the regulation of public utilities. Nevertheless, within that limited sphere, the Commission's jurisdiction is quite broad; it may investigate and order remedies for rates, charges, terms, conditions, practices, acts and service that are unjust, unreasonable, unjustly discriminatory or otherwise in violation of Title 35-A. *See* 35-A M.R.S.A. §§ 1302, 1303 and 1306.

We have not found cases that discuss whether a state administrative agency of limited jurisdiction must entertain a claim that actions by entities over whom they have jurisdiction have violated federal utility law. Nevertheless, the underlying reasoning of the *Howlett* case and its predecessors would appear to be applicable not solely to courts or to courts of general jurisdiction. The Maine Public Utilities Commission has jurisdiction over the intrastate telephone service of Bell Atlantic. It has the powers under state law to consider claims that a utility has acted unreasonably and to order unreasonable actions remedied. CTC has claimed that Bell Atlantic's actions are unjust and unreasonable under 35-A M.R.S.A. § 1306 and we have jurisdiction over that claim. Congress has enacted a statute that also governs intrastate resale activities by telephone utilities. Under the principles enunciated in *Howlett* and *McKnett*, it follows that because we have jurisdiction over the state claim, we also have jurisdiction over the federal claim based on the same facts. Under the *Howlett* principle, as applied to this state agency of limited jurisdiction, we decide that we

should consider a federal claim when we have jurisdiction over a *related* state law claim. It does not follow, of course, that we must entertain claims based on a wide variety of federal laws that do not relate to the rates and services of public utilities that we regulate under state law.

For the reasons described, we will consider whether Bell Atlantic's actions, if proven as alleged, constitute either an "unreasonable act or practice by a public utility" (35-A M.R.S.A. § 1306) or an unreasonable restriction against resale (47 U.S.C. § 251(C)(4)).[8]

IV. REASONS FOR INVESTIGATION; SCOPE OF INVESTIGATION

As discussed above, we commence an investigation pursuant to 35-A M.R.S.A. § 1303. We find that CTC has alleged facts and claims that merit further investigation. CTC claims that Bell Atlantic's actions constitute an unreasonable restriction on resale. CTC alleges that Bell Atlantic will sell certain retail services to CTC, so that CTC may resell the services to its retail customers. However, Bell Atlantic enforces the termination provisions that apply to its own retail customers for those services.

CTC is apparently willing to purchase the services subject to the termination clauses, such that if CTC terminated the resold service prior to the end of the contractual or tariff obligation, it would be responsible for payment of the termination fees to Bell Atlantic. CTC has stated in an

[8]CTC's third claim is that Bell Atlantic's actions breach the resale agreement between CTC and Bell Atlantic. No statute defining the Commission's jurisdiction specifically mentions the failure of one utility to honor contractual commitments with another utility. Nevertheless, such action may constitute an unreasonable act or practice under 35-A M.R.S.A. § 1306.

The Examiner also asked parties to address the potential "overlap" of the TelAct claim before this Commission and a claim, also under the TelAct, that CTC has brought in the Federal District Court for the district of Maine. In CTC's memorandum filed on April 28, 1998, it states that the claim in federal court differs from the claim filed here. The claim in federal court seeks to compel Bell Atlantic to resell the services that are subject to termination clauses to CTC at a wholesale rate. *See* 47 U.S.C. § 251(c)(4)(A). By contrast, the complaint filed before this Commission requests us to order Bell Atlantic to sell the services to CTC at retail rates without a wholesale discount.

affidavit attached to its complaint that Bell Atlantic would not suffer financial detriment if it sold the services in question to CTC, subject to all of the conditions that apply those services. We will therefore consider whether Bell Atlantic's enforcement of the termination provisions applicable to its retail customers, when it sells a service to a reseller, is an unreasonable act or practice within the meaning of 35-A M.R.S.A. §§ 1303 and 1306. More specifically, we will consider whether Bell Atlantic's actions constitute a restriction on resale within the meaning of 47 U.S.C. § 251(c)(4), and, if so, whether the restriction is unreasonable.

We emphasize that we consider only the claim brought by CTC. CTC does not appear to attack the validity of termination clauses themselves. It does not argue that the Commission should find that termination clauses impede competition or are otherwise invalid. It does not argue that they should not be enforced or should be abrogated. Those issues are the subject matter of another Commission proceeding, *Inquiry Into Whether Incumbent Local Exchange Carriers Should be Required to Provide Their Customers with an Opportunity to Terminate Special Contracts Pursuant to Request for Rulemaking by Freedom Ring Limited Liability Company* (Docket No. 96-699).

ACCORDINGLY, we commence an INVESTIGATION pursuant to the provisions of 35-A M.R.S.A. § 1303 into alleged activities of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Maine to determine whether these Bell Atlantic's actions are an unreasonable act or practice within the meaning of 35-A M.R.S.A. § 1306, or whether they constitute an unreasonable restriction of resale within the meaning of 47 U.S.C. § 251 (c)(4).

Dated at Augusta, Maine this 18th day of May, 1998.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice

of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.